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Essay

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"All would live long and none would be old."
—Ben Franklin

America is growing older, so we are told. Newspapers and magazines report the fact. An increasing number of books are devoted to the topic of aging. Conferences convene to analyze the "problem" of an aging society. In our daily lives we see more elderly individuals everywhere we go—on the bus, in line at the supermarket, at the museum, and at vacation resorts.

Statistics verify our impressions. There are more elderly Americans than ever before. Whether measured by an increase in the percentage or by an increase in absolute numbers, more Americans are older—age sixty-five or over—than in any time in the past.[1] Yet the numbers disguise the more fundamental question: Who is old?

I. Who Really is "Elderly"?

Statistics count who is old merely as a function of chronological age. But a more accurate description, reflecting how most of us naturally think, is to classify who is "elderly" by more than just one criterion. Typically before we think of a person as being old, we look at a combination of factors such as chronological age, functional capacity, social involvement, and physical and mental health.[2] As a result, we might say that a healthy, functioning sixty-three-year-old is not elderly,

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1. Longino, Soldo & Manton, *Demography of Aging in the United States*, in GERONTOLOGY: PERSPECTIVES AND ISSUES 19 (K. Ferraro ed. 1990) [hereinafter Longino].

2. Achenbaum, *Societal Perceptions of Aging and the Aged*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 129 (R. Binstock & E. Shanas ed. 1985).

but that a poorly functioning, unhealthy sixty-year-old is elderly.[3] Yet at some point chronological age alone is enough for all of us to agree and to label an individual as elderly. For example, everyone would concur that an eighty-five-year-old is elderly. But not everyone would refer to all sixty-year-olds as elderly. For purposes of this Essay, we shall use age sixty-five as the entry age for being classified as elderly. Although admittedly this is an arbitrary age, it is the "traditional" age of retirement and the age that most commentators use as delineating old age.

Before we simply say anyone over sixty-five is old, however, we really ought to ask, "Why do we care?" For if we classify people, we do so (or at least *ought* to do so) for some reason. We group and count individuals by race, for example, because we consider race relevant in many respects if only to ensure that race is not used as an irrelevant criterion. We do not classify people by eye color in any official manner because, although certainly a fact, it is not a relevant fact.

So, why do we so frequently group individuals by age, whether for official ends—such as eligibility for social security benefits—or in our day-to-day informal discussions? We do so, it seems, because the elderly have something in common that they do not share (or that they share to a much lesser extent) with the rest of the population. Just as we group babies together and teenagers together because of their respective shared characteristics (dependency in the case of the former, adolescence for the latter), so also do we group the old together.

But just what are the common characteristics of the old that differ from the rest of the population? It is conventional wisdom that the qualities of senescence distinguish the elderly from the young. Typically, we think of the loss of physical capacity and, to a lesser extent, the loss of mental capacity. Though most certainly not shared by all, it is the often experienced loss of mental alertness and agility and the even more common, if not universal, loss of physical strength, flexibility, endurance, and the deterioration of the senses that the elderly share to the exclusion of the nonelderly. Although many individuals who are not elderly suffer the loss of physical or mental capability, it is the inevitable loss of physical vigor and the increasing possibility of the loss of mental alertness that makes it sensible to label those over the age of sixty-five as elderly and to consider them as a group. It is not by chance that if younger persons suffer a permanent physical or mental ailment, we label them "disabled." Yet, should a similar affliction strike older in-

3. Try it. Think of an older colleague, one past age 60. Do you think of him or her as being old? If not, why not? Who do you think of as old? Why? I was surprised, for example, to learn that our law school budget director was about to retire. I had never thought of this active, vigorous woman as old. Indeed she was; at least old enough to qualify for retirement.

dividuals, we are likely merely to identify them as being "old."

All of this categorizing by age is in a way false. Merely being old in years does not signify that one has lost physical or mental capacity. As a generalization about the old, it is false as to many particular individuals and is, therefore, a particularly pernicious generalization. Labelling an entire group as "the elderly" merely because of the infirmities of some inevitably leads to the perception and widespread belief that all members of the group suffer from diminished physical and mental capacity. All become tainted with the problems of a minority. Still, if we keep in mind that not all the old have diminished mental capacity and that the extent of the loss of physical capacity varies greatly, it is useful to perceive that if many of the elderly did not so suffer, it is unlikely that we would group them together.

By grouping the chronologically old together and labelling them "elderly" we impute to them characteristics associated with the label. In general, if the characteristics truly reflect those possessed by the individual so labeled, all the better. The label serves as a shorthand manner of identifying characteristics of the individual to which we wish to call attention.

But if the generalized label misses the mark as to a particular individual and falsely attributes some of the group characteristics to the labeled individual, we are driven to ask why anyone would use a deceptive label. We do not, for example, similarly group together individuals between ages twenty and sixty. While we may speak casually of "yuppies" or "the middle-aged," no one knows of just whom we are speaking when these terms are employed. Are yuppies those aged twenty to thirty, or twenty-five to forty? Who is to say? Who exactly is middle-aged is even more difficult to pin down. When you are twenty you might think of anyone age thirty-five to fifty-five as middle-aged. But when you are thirty-five, you are more likely to see the middle aged as only including those age forty-five to sixty. When you are age fifty-five, you may well accept the title "middle-aged," but you may insist that it extends until age sixty-five. Perhaps the best distinction between middle age and old age was noted by Groucho Marx: "Middle age is when you think things will feel better in the morning. Old age is when you hope to wake up in the morning."

In cultural terms, old age seems fairly well set as beginning at age sixty-five.[4] This is not because physical deterioration and possible men-

4. Some might place it at an earlier age, age 60 or even age 55, and a few try to move its onset upward to age 70 or 75. But in the main, our culture marks age 65 as the inception of old age. With the barring of mandatory retirement (which traditionally was set at age 65) and with the normal retirement age for Social Security benefits due to gradually rise to age 67, however, the universal acceptance of age 65 as the gateway to old age may be eroding. Walz,

tal decline necessarily commence at that age. Age sixty-five has no particular physiological significance because old age has no sudden manifestation or appearance. After all, although most of us hate to admit it, we grow older every day of our lives. In reality, physical deterioration is steady and irreversible. Although keeping "in shape" may mask the trend by allowing the body to perform up to its potential, the inevitable decline in potential cannot be forestalled. What we choose to call "old age" is merely social convention. If we label someone at age sixty-five as "elderly," we do so not because they are elderly by innate characteristics, but rather because we choose to label them so.

Many who are past age sixty-five might object that they are not old. By that they mean that, though old in years, they are not old in body or spirit. Conversely, there are those who are not yet sixty-five whom we might think of as old. In a word, our chronological age is only a very rough indicator of "elderlyness" if we take that term to mean the relative state of an individual's physical or mental condition. So we have come full circle. We cannot generalize as to which individuals are old because the term is a measure of the individual's particular physical and mental condition.

But even after admitting that generalizations are spurious, and concentrating on the individual, it is difficult to say with certainty who is old and who is not. The state of being old has no bright line at which it commences. It is a condition that certainly exists, but we have no definition that crisply cleaves the old from the non-old. One cannot say, "Today I became old." At some point we will admit that we are old, but just when that occurred is unknown even to the individual. As white turns to gray and then to black, so does youth turn to middle age and then to old age. Though we know that it occurs, we do not know just when.

Why then do we choose to use a label that so falsely characterizes so many of those over age sixty-five? False labeling often indicates an intent to deceive or to confuse the true nature of the labeled individual. That motive, however, does not seem to be the reason that we label all those over sixty-five as elderly even though that population varies so greatly in characteristics. Rather we use the labels "elderly," "old," or "senior citizen" because it serves our purposes to do so. Even though by so labelling we draw into a common fold those of very disparate characteristics, we nevertheless bring together individuals with something in common that is of overriding importance to us. If we call all

Aging in the Twenty-First Century: Implications for the Profession of Law, in AGING AND THE LAW: LOOKING INTO THE NEXT CENTURY 6 (P. Powers & K. Klingensmith ed. 1990) [hereinafter AGING AND THE LAW].

those over sixty-five old it is because the fact that they are over sixty-five is more important for our purposes than that they are often very different in almost all other ways.

While admitting, then, that biological age—physical and mental condition—is only loosely related to chronological age, we cannot ignore the reality that societal institutions commonly use age sixty-five to mark the beginning of old age. For example, we favor the elderly with Social Security benefits, and until quite recently, we decreed that "normal" retirement should occur at age sixty-five.[5] The use of a precise chronological age in these contexts arises out of practical necessity. Governments, employers, and other institutions would rather not operate in a world of gray indeterminacy. They prefer bright-line tests. The government pays Social Security benefits not because one has deteriorated physically, but because one has reached age sixty-five and has retired. The employer's preference would be to retire employees at age sixty-five, and not have to rely on a more subjective, individualized critique of their abilities. The movie theater grants reduced admission to all "golden agers," and thus avoids requiring a demeaning showing of financial need.

When not using age criteria as a means of making distinctions, institutions perform rather poorly. When the government bases benefits upon a showing of disability, the result is a snarl of litigation as to just who is "disabled."[6] Employers who can no longer engage in mandatory retirement arrange pension benefits to encourage voluntary retirement in order to spare themselves the attempt at justifying forced retirement of a particular individual.

The use of chronological age, usually age sixty-five, as an indicator or monitor remains common and reinforces the general cultural sense that after age sixty-five one is old. Even as we use chronological age as a shorthand indicator of "oldness," we should not forget that it is only a rough indicator. In reality, being old or elderly is a state of being neither limited only to the group of individuals over age sixty-five nor universally applicable to that group.

5. The reliance on age 65 is commonly attributed to Germany's Chancellor Otto Von Bismarck, who created the German social welfare system in 1889. Among the welfare programs was a forced retirement age and public pension program. Originally the retirement age was set at age 70, but in 1916 it was reduced to 65. At that time, Germany was fighting in World War I, so it seems probable that the lower retirement age was designed to elicit public support for the government. We will note that this certainly is not the last time that the onset of public benefits for the elderly was changed for political gain rather than as a result of a new insight into when people become old. *See* D. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 342 n.4 (1989).

6. Murphy, *When the Government Ignores the Law: The Consequences of Relitigation*, 29 JUDGES J. 2, 3 (Summer 1990).

II. An Aging Population: A Statistical Profile of the Elderly

A. General Trends

Examination of current and projected demographics in the United States reveals three significant trends. First, the absolute number of elderly individuals is increasing.[7] Second, the percentage of the total population that is elderly is increasing.[8] Third, the ration, the ratio of workers (those age twenty to sixty-four compared to those age sixty-five or older), has steadily fallen for the past fifty years and will continue to fall for the foreseeable future.[9]

Two reasons have been advanced to explain the significant growth in the number of elderly. First, the number of individuals who reach age sixty-five increases every year. In 1991 more Americans will celebrate their sixty-fifth birthday than did so in 1990. Between 1995 and 2005, however, the number of new sixty-five-year-olds will decline as a result of the lower birth rates of the Depression in the 1930s. But as the baby boomers age, the numbers of sixty-five-year-olds will increase again beginning in the year 2005.[10] After 2030, barring any extraordinary increase in immigration rates, the number of individuals turning sixty-five will decline again until the children of the baby boomers—the "baby boomers redux" born between 1985 and 2010—begin to age, in around 2050.

The birth rate (fertility) is responsible for only part of the population growth of elderly Americans. Immigration also contributes to

7. P. ZOPF, AMERICA'S OLDER POPULATION 12 (1986).

8. *Id.*

9. *Id.* at 47; *see also infra* note 24. A sampling of statistics regarding the actual population of Americans over the age of 65 in the past and the projected growth of that population illustrates the general trend toward growth of this group in the United States. In 1950, the population of individuals over 65 constituted 8.1% or 12,295 thousand of the total United States population of 151,326 thousand citizens. By 1980, individuals over 65 made up 11.3% of the American public with a group membership of 25,544 thousand people out of the total population of 226,505 thousand. Notably, from 1950 to 1960 the over-65 age group grew from 8.1% of the total population to 9.2%, only to jump again by 1970 to 9.9% before reaching the 1980 figure of 11.3%.

The projected figures are even more startling and the growth projections more extreme. In 1990 the over-65-year-olds constituted 12.7% or 31,799 thousand of the 249,731 thousand total United States population. This figure is projected to grow to 13.1% of the total population by 1995 and remain at that level through the year 2000. The number of over-65 Americans is projected to grow significantly between 2000 and 2025, when this age group will constitute 19.5% of the population. The final projection for 2050 places the American population at 308,856 thousand, with the over-65 group comprising 67,060 thousand or 21.7% of that total. All figures drawn from U.S. Bureau of the Census, 1980 Census of Population, Supplementary Reports, PC80-S1-1, *reprinted in* P. ZOPF, *supra* note 7.

10. P. ZOPF, *supra* note 7, at 10.

the total number of the elderly, although ultimately it lowers the percentage of the population that is elderly because most immigrants are relatively young.[11] The statistical profile of immigrants is younger than the population into which they immigrate.[12]

The fact that individuals live longer is the other major contributor to the increase of the elderly. Not only do more individuals survive until age sixty-five, they have a longer life expectancy once they reach that age. Life expectancy measures the number of years an individual is expected to live as measured from birth. Over the years, life expectancy in the United States has gradually increased; consequently, more individuals survive until age sixty-five and beyond. In 1950 the average life expectancy of a United States resident was 68.2 years; by 1985 that figure had increased to 74.9 years.[13]

Life expectancies can be broken down by race and by sex. In 1985, for example, white male Americans had an average life expectancy of seventy-two years, while their white female counterparts' average life expectancy was 78.9 years.[14] In 1985, nonwhite[15] males had a life expectancy of 65.5 years; nonwhite women had an average life expectancy of 73.6 years. Life expectancy figures such as these can be deceiving, however, because they merely predict the average (mean) age of death for "age cohorts"—all those born in the same year. When we say that American women born in 1990 have a life expectancy of "x" years, all we are saying is that if death rates[16] do not change, "x" years is the average number of years that this specific age-sex cohort is expected to live. Life expectancy tables have only modest predictive value because the death rate always has fallen from that projected. That is, the average life span of the age cohort increases over time.

In addition, more than half of the age-sex cohorts will live past the projected life expectancy age. If we say that life expectancy is "x" years, we only predict an average mean age of death for a cohort. Since some members of the cohort begin to die soon after birth, thereby greatly lowering the average age, many must live past the average age.

What is of more interest than an individual's life expectancy at birth is how long he can expect to live from today. If he is age sixty-

11. *Id.* at 5.

12. *Id.*

13. Longino, *supra* note 1, at 25.

14. *Id.*

15. "Nonwhite" refers to anyone who would not declare his race to be white or Caucasian and therefore includes, *inter alia,* African Americans, Hispanics, and Asian Americans.

16. Death rates refer to the number of cohorts per thousand that died in a particular year. The projected death rate determines the life expectancy of the cohort. As the death rate declines (*i.e.,* fewer members of the cohort die in each year), the life expectancy of the cohort increases (*i.e.,* more years will pass before half of the cohort will have died).

five, for example, how much longer can he expect to live? As a person grows older, his life expectancy rises as his cohort group is redefined to include only those surviving. If he is age sixty-five, his life expectancy is based upon the average age of death for those who reach age sixty-five. That figure will be higher than at birth since it will not include those who died before they reached age sixty-five.[17]

Finally, the percentage of the population that is elderly increases in part because of falling birth rates. As individuals age, the elderly become a larger proportion of the population because there are relatively fewer young people. As fertility rates level off, the percentage of elderly in society will diminish even though their absolute numbers will continue to grow.[18]

B. Growth in the Over-Age-Eighty-Five Category

The elderly are by no means a homogeneous group. We would not think of lumping together any other age group that ranges over thirty-five years (*e.g.*, age sixty-five to one hundred plus). In recognition of the wide age span, many observers now sub-categorize the elderly into three groups: the young old, age sixty-five to seventy-five; the old, age seventy-five to eighty-five; and the old old, age eighty-five plus. The utility of categorizing by age is debatable. It may be more sensible to group the elderly by physical and mental capability; for example, the well elderly, the frail elderly, and so on.

Be that as it may, the rapid rise in the numbers of persons age eighty-five or older is noteworthy. As of the last census in 1980 there were over 1.5 million women and 675,000 men eighty-five years old or older.[19] In terms of percentage growth, those over age eighty-five are the fastest growing age cohort.

Growth in the number of those over age eighty-five often is cited as cause for particular concern. It is claimed that this group will put

17. Statistics illustrate that the additional life expectancy of those who reach age 65 rose between 1950 and 1985. Measured for the group as a whole, the life expectancy rose from 13.9 years in 1950 to 16.1 in 1970 and finally to 16.9 in 1985. Female life expectancies, as compared to male, were higher for each of these years with 15 years in 1950 (male 12.8), 18.1 in 1975 (male 13.8), and 18.6 in 1985 (male 14.8). *Id.* The life expectancies of the white male and female 65-year-old population for these years were essentially the same as those for the group as a whole. *Id.* (The fact that the life expectancy figures for whites are identical to those for the overall group indicates that nonwhites did not make up a significant part of the sample group.) Notably, the life expectancies of the nonwhite 65-year-old population were lower than those of the total in all years for both men and women. In 1985, for example, nonwhite male life expectancy at age 65 totalled 13.6 years and nonwhite female life expectancy totalled 16.9. *Id.* These figures clearly illustrate that those individuals who live until age 65 statistically have a number of years remaining to live.

18. I. ROSENWAIKE, THE EXTREME AGED IN AMERICA 6 (1985).

19. *Id.* at 7.

particularly heavy demands on the health care systems, supported living arrangements, and nursing homes. Those who live past age eighty-five also may outlive their children, thereby raising personal assistance issues, emotional support problems, and concern for their financial well-being.[20] Certainly our current laws and governmental programs were created when the number of individuals in this age group was much lower. Whether those laws and programs will meet the needs and the problems of the old old is problematical. The expected growth of this group alone gives good cause to examine the relationship between the elderly and the law.

C. Aging Patterns by Gender

Patterns of aging differ by gender. As was illustrated by some of the statistics discussed above,[21] women outlive men. The graying of America is in large part a female phenomenon.[22] The overwhelming ratio of elderly women to elderly men cannot be overemphasized. At every year past age sixty-five, women greatly outnumber men. When we refer to elderly, we should visualize women. If the term "elderly individual" conjures up a picture of a man, bear in mind that he is a minority representative and a rather small minority at that.

For society, its policy, and policy makers, the preponderance of elderly women has profound significance. How society allocates its resources to assist the elderly should (but does not always) take into account that the elderly are mostly women. In financial support, for example, before we assume that the elderly have sufficient financial resources we must ask whether elderly women, many of whom were not in the wage force when younger, have adequate independent financial support if they are single, divorced, or widowed. We cannot let statistics that include elderly couples or elderly men obscure the realities of elderly unmarried women. When considering health care support, we should remember that women and men do not share the same health problems. Heart illness, for example, is largely a male affliction. Breast cancer is primarily a female malady.

D. Aging Patterns by Race

Nonwhite Americans do not live as long as white Americans. For a host of economic, health care, and cultural reasons, nonwhite Amer-

20. *See generally id.*

21. *See supra* note 17.

22. The so-called sex ratio confirms this. The ratio is the percentage of males to females at a given age. At age 5, the ratio is 105%. By age 60 the ratio is 88%; by age 65 the ratio is 83%; and at age 75 the ratio declines to 70%. P. ZOPF, *supra* note 7, at 57.

icans have a shorter life expectancy than whites. As a result the elderly are disproportionately white.[23] Although the life expectancy of minorities is increasing (as are the numbers of African American and Hispanic elderly), the gap between whites and minorities continues with no evidence that it is going to close soon.

For social policy planners, the shorter life expectancies of African Americans and Hispanics mean that benefit programs for the elderly disproportionately favor whites. For example, although all employees regardless of their race or gender pay Social Security taxes, because of their higher death rates, many minorities will not live long enough to collect retirement benefits. When the minimum age for collecting Social Security benefits is raised, all employees are disadvantaged, but minorities particularly are harmed because a greater number of them will not live long enough to collect retirement benefits.

E. Dependency Ratios

The rapid growth in the number of the elderly has sparked fear that their growing numbers means an increasing financial burden on the rest of the population. Statistically this fear is represented by various ratios, the most common being the ratio of workers to elderly.[24]

The relative decline in the number of workers to retirees often is cited as cause for alarm. Who, it is asked, will pay the Social Security retirement benefits promised to the old? The unstated premise is that the deserving workers (the "worker bees") are being victimized by the retirees (the "drones"). One only can speculate why no one publishes statistics that compare the number of workers with other non-wage earners such as college students.

An interesting twist on the worker to retiree ratio is the so-called dependency ratio. Although the term "dependency" is not defined, the

23. A few statistics are illustrative. In 1980 the percentages of white men surviving to ages 65, 75, and 85 were respectively 72.3%, 47.5%, and 18.3%. The survival rate of nonwhite males (African American, Hispanic, and those of and other races) for these same ages compared at 58%, 35.5%, and 13.9% respectively. Similarly, white females' survival rates also compared more favorably with survival rates of nonwhite women (African American, Hispanic, and those of other races) at ages 65, 75, and 85: 84.7% survival for white women to age 65 contrasted with 75% for women of other races; 68.5% survival to age 75 versus 55.7% for women of other races; and 38.4% survival to age 85 compared with 29.6% for females of other races. *Id.* at 33.

24. The ratio of workers (those age 20 to 64) to elderly (those individuals over 65) has declined steadily since 1950. In 1950 there were 7.1 workers for each elderly individual in the United States. By 1970 that number had dropped to 5.3 workers and by 1990 to 4.6 workers per elderly. The figure is expected to continue to decline in the future: by the year 2025 there will be only 2.9 workers for each elderly individual and by 2050 the number is projected to decline to 2.5. *Id.* at 47.

ratio is considered an index of "support burdens."[25] The elderly, it is said, are not the only population burden upon those between age eighteen and sixty-five. The young, those under age eighteen, also must be supported. Society's ability to assist the elderly is a function not only of the relative numbers of elderly, but also of the relative numbers of all dependents, elderly and young alike.

The dependency ratio is calculated as follows: the number of individuals for a given year age nineteen to sixty-four compared to the number of individuals age eighteen or younger or age sixty-five or older. For example, the dependency ratio in 1950 was 1.38 (meaning that for every individual age zero to nineteen and age sixty-five plus, there were 1.38 individuals age twenty to sixty-four), 1.09 in 1970, estimated to be 1.42 in 1990, and estimated to be 1.28 in 2025.[26]

The usefulness of a dependency ratio is questionable. The title of the ratio assumes that everyone over age sixty-five or under age nineteen is a dependent and that everyone between age nineteen and sixty-four is a producer. Since both assumptions are false, the usefulness of the ratio is significantly undermined. Moreover, the term "dependent" is ambiguous. Just because someone is not in the wage-earning labor force (the most probable meaning of the term) does not mean that the individual is not productive or that he is dependent upon others. Some of the elderly provide support for their children or grandchildren. Most of the elderly are not dependent on others for their daily care.[27] Much of their financial support comes from pensions (essentially deferred income) or from savings.[28] To be sure, many of the elderly are dependent upon Social Security benefits; to the extent that they are, they can be said to be dependent upon the younger, working population.[29]

To group the young and old together as comparable "dependents" is also a questionable practice. The needs of individuals in each group are quite different. Those under age eighteen who are dependent almost always are supported by their parents, while the dependent elderly are more likely to be supported by society.[30] The chief societal cost for the

25. *Id.* at 39.

26. *See id.* at 47 (table illustrating dependency ratios for every 10 years since 1950 and projected for years 2000, 2025, and 2050).

27. AMERICA'S ELDERLY: A SOURCEBOOK 112 (E. Duensing ed. 1988).

28. *Id.* at 65.

29. Social Security retirement benefits do not represent a return of prior Social Security taxes. Rather, current benefits are paid for by the Social Security wage taxes borne by the current workers. It is estimated that in four years the average retiree receives in retirement benefits an amount equal to all that he contributed to the system.

30. In 1983, for example, Social Security and railroad retirement was the source of 44% of the income of unrelated individuals age 65 or older and 34.3% of families whose primary

care of the young is education. Yet, while costly, educational expenses, as with all costs of raising children, can be seen as investment in the future. Rearing the young produces productive members of society, but the costs of the old have no comparable payoff. No one would deny the moral or ethical obligation of support of the elderly; in economic terms, however, the cost is high.

III. The Physical Effects of Aging

Generalizations about the elderly are fraught with falsehoods. Individuals vary greatly, and to generalize that all elderly are "this" or "that" is often clearly false as to any particular individual elder. While not true as to the individual, however, generalizations can be true in a statistical sense. The following generalizations are thus both false and true, but it is in their true aspect—statistically as to the group—that they have implications for public policy and the law.

The inevitable decline in physical vigor is the most salient feature of aging. With advancing age, bones gradually lose calcium, become weakened, and fracture easily. The spine shortens, with the loss of two or three inches of height. The cartilage thins and the discs between vertebrae become narrower. The vertebrae may compress, and the spine may bend forward causing the commonly observed shoulder hump in older women. The bones in the hip widen, the shoulders narrow, joints become stiff and painful, and walking becomes more difficult.[31]

The elderly lose fat from their arms, legs, neck, and face that results in wrinkled arms, thin legs, and indented cheeks, though they gain fat and thicken in the hips and trunk. Men and women lose hair. Ears may become longer, noses flatter, and eyes may become sunk in their sockets. Muscle strength and size decrease with age and so the elderly look and are more frail. The degree of muscle loss is directly related to the degree of physical activity (absent illness).[32]

Almost all the elderly suffer some vision impairment including decreased ability to see close objects, loss of peripheral vision, increased sensitivity to glare, and difficulty adjusting from light to dark. An elder's vision is particularly weak in dim light: he is less able to focus on moving objects and to perceive color. The loss of vision associated with age is not an illness and may not be correctable.[33]

supporter was age 65 or older. The second largest sources of income are from assets or pensions. AMERICA'S ELDERLY, *supra* note 27, at 65.

31. D. TOMB, GROWING OLD 15 (1984).

32. *Id.* at 15-16.

33. *Id.* at 21-23.

Hearing also declines with age. Beginning in the fifties, there is a gradual loss of perception of higher and lower frequencies. This permanent loss of hearing—called presbycusis—is the result of a gradual physical deterioration of structures in the inner ear. The loss of hearing can cause misperceptions and causes some deaf older people to become isolated, lonely, and depressed.[34]

While severe memory loss is a sign of illness, mild memory loss is commonplace among those in their seventies or eighties. The loss may be due to a gradual loss of neurons or a decrease of blood flow to the brain. The loss is one of retrieval; the memory is fine and new facts can be learned, but their recall may prove problematic.[35] While the elderly suffer short-term memory loss, older events may become more vivid in memory.[36]

In addition to predictable physical changes, the elderly tend to suffer more from chronic conditions. A condition is any departure from physical or mental well-being. An acute condition is a temporary condition, whether as serious as pneumonia or as nonthreatening as a head cold.[37] A chronic condition is a permanent or long-term condition; examples include diabetes, heart disease, arthritis, and deafness. Acute conditions, short-term injuries or illnesses, actually decline with age. The part of the population over age sixty-five experiences the fewest number of acute conditions.[38] The number of days of restricted activity that results from each acute condition, however, is greater for the elderly. Conversely, the incidence of chronic conditions rises with age. The over age sixty-five group has the highest incidence of chronic conditions as well as the greatest limitation on activity as a result of these conditions.[39]

The general decline in physical vigor coupled with the greater incidence of chronic illness pervades the lives of many elderly individuals. As a result their self-esteem declines, they feel dependent, less in control of their lives and they experience a loss of mastery over their environment. They become less able to participate in activities of daily living, more isolated, and they may lose hope for the future. They may become fatalistic or even clinically depressed. Their psychological profile, in short, may differ radically from the younger population.[40]

34. *Id.* at 23-24
35. *Id.* at 27-28.
36. R. ATCHLEY, SOCIAL FORCE AND AGING 91 (5th ed. 1988).
37. *Id.* at 75.
38. *Id.* at 76.
39. *Id.* at 78.
40. Schefft & Lehr, *Psychological Problems of Older Adults,* in GERONTOLOGY: PERSPECTIVES AND ISSUES, *supra* note 1 at 283, 288.

The greater susceptibility of the elderly to chronic illness makes them particularly dependent upon medical and custodial long-term care. That need is reflected in such programs as Medicare and Medicaid, which subsidize elderly health care. The determination of just how these and related programs operate has proven a fruitful source of employment for many lawyers. Indeed, the law and lawyers have an important role to play in the design, analysis, and evaluation of governmental medical support to the elderly.

IV. The Challenge to the Law

A. Unique Circumstances of the Elderly

(1) Mortality: The Need for Haste

"In the long run we are all dead."
—Lord Keynes

When discussing the problems of the elderly and possible solutions, we should not forget that although the number of elderly is increasing, the life expectancy of any particular individual is decreasing. While social planners have time to research and to ponder solutions, the lawyer working for an individual client has no such luxury. If the client's problem is not solved soon, the death of the client may make it moot. Even if death does not intervene, changes in the client's circumstances such as finances or health may intensify the problem or radically limit the range of choices. The elderly who seek legal assistance need help now, not in the distant future or when it is convenient. The lawyer who accepts the elderly as clients may need to work according to a faster timetable than is customary.

For social planners, the need for swift decisions also holds true. While the elderly always may be with us, the composition of the elderly always is changing. Solutions that are deferred, policies that are impeded, or benefits that are delayed may arrive too late to help today's elderly. For example, to promise improvements in nursing home conditions five years from now is of little comfort to many of present nursing home residents. Hence, there is a need for some haste in the process. To be sure, precipitous action is to be avoided, but we cannot lose sight of the passage of time and its inevitable consequences for the elderly population.

(2) Complications Resulting from Declining Physical and Mental Capacities

The elderly as a group present special challenges to the legal system because many suffer serious loss of physical and mental capacity. How the law should respond is a central theme of any study of the elderly and the law. Of course, the elderly are not alone in suffering from these problems; younger persons also lose physical or mental capacity or face severe economic difficulty.

Why then single out the elderly? That too is a question that is at the center of any definition of elder law. There are two obvious reasons to identify the elderly as a discrete group in regard to these problems: first, the greater frequency of the loss of physical and mental capacity in the elderly; and second, their greater economic vulnerability.

The elderly suffer more from the loss of mental capacity than any other age group. This loss, however, is not directly a function of age. Rather it results because the elderly are susceptible to dementia (a generic term for intellectual decline), a disease that essentially afflicts only the elderly.[41] The elderly also may suffer from sharply diminished physical capacity. For example, the term "frail elderly" correctly suggests that many of the elderly, particularly the very old, have special needs because of their poor physical state.[42]

Second, the elderly appear to be very economically vulnerable. In fact, the elderly as a group are actually slightly less poor than the rest of the population.[43] But many of the elderly are poor, desperately so.[44] Even within the elderly population, vast differences of need exist. In general, increasingly older populations have a greater percentage of poverty.[45] The elderly poor need help, but the cause of their poverty and the solutions to it are quite different from those for the nonelderly. Answers to poverty among the young, such as job training, education, and temporary welfare, are not appropriate and not responsive to the needs of the elderly, whose poverty can be traced to age discrimination in hiring, retirement, disability, poor health, or widowhood. How the law should respond to the needs of the elderly and to the great financial differences among the elderly is truly a conundrum.

41. Most, though apparently not all, dementia is caused by Alzheimer's disease. Over one-half of individuals who suffer from dementia have Alzheimer's disease, but over 50 other diseases may contribute to dementia. Van Den Noort, *Alzheimer's Disease and the Dementing Illnesses,* TRAUMA, Apr. 1985, at 16. *See also infra* notes 46-50 and accompanying text.

42. I. ROSENWAIKE, *supra* note 18, at 128.

43. R. MARGOLIS, RISKING OLD AGE IN AMERICA 9 (1990).

44. *Id.* at 10.

45. I. ROSENWAIKE, *supra* note 18, at 84-89.

(3) Alzheimer's Disease

For the most part the elderly suffer the same medical problems as the rest of the population.[46] Some conditions are more prevalent among the elderly, but few are age specific. One important exception is Alzheimer's disease, a form of dementia or loss of mental powers that affects over 2.5 million Americans. Although Alzheimer's may have its onset in individuals as young as age forty or fifty, most victims are over age sixty-five. Indeed, Alzheimer's affects about five percent of individuals between age sixty-five and eighty, and twenty percent of those over age eighty.[47]

Alzheimer's victims suffer a slow deterioration of mental capabilities as the disease progresses through stages from mere forgetfulness, to confusion, to severe dementia, to a coma, and finally to death. During the early stages of the disease, the individual suffers a loss of sensory perception that leads to episodes of disorientation of time and place. The individual often becomes confused and disoriented and may lose his way in familiar settings. As the disease progresses, physical skills decline until the victim becomes unable to care for himself. In time, cognition is lost and the individual cannot speak, recognize others, or even know who or where he is.[48]

While Alzheimer's disease is a personal tragedy for the individual, it also presents society with a host of problems, in particular the allocation of medical and social services. For the law, the high incidence of dementia caused by Alzheimer's or some other disease raises serious challenges. As dementia progresses, the victim gradually loses mental competency. Traditionally the legal response to an individual's loss of competency has been court ordered guardianship. That system, however, never envisioned the numbers of elderly incompetents that we now have.[49] Nor was the system designed to effectively handle the myriad of financial problems and health care issues that confront the guardians of today's incompetent elderly.[50]

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46. R. ATCHLEY, *supra* note 36, at 58.

47. *Id.* at 108-09.

48. Willott, *Neurogerontology: The Aging Nervous System,* in GERONTOLOGY: PERSPECTIVES AND ISSUES, *supra* note 1, at 77.

49. *See* Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform,* 23 ARIZ. L. REV. 599, 601 (1981).

50. Guardianship is a creature of state law and therefore varies from state to state. Still, guardianship in general has been severely criticized in the past few years. Present guardianship laws and practice are said to be procedurally inadequate, substantively archaic, demeaning to the elderly, and operated in a manner that permits widespread abuse and corruption. *See, e.g.,* Ander, *A Model for Determining Competency in Guardianship Proceedings,* 14 MENTAL &

(4) Economic Vulnerability: Dependence on the Promises of the Young

The elderly are vulnerable because they are economically dependent on the nonelderly. The elderly may be directly dependent. A son or daughter, for example, may provide regular financial assistance such as rent or may pay for larger expenses such as a new car. Most of the elderly are probably not so explicitly dependent, yet almost all the elderly are indirectly dependent. Their continued receipt of Social Security retirement benefits, for example, depends upon current wage taxes that are, for the most part, paid for by the nonelderly. If political support for the current rate of benefits were to disappear, the elderly recipients could well lose those benefits. Medicare and Medicaid, the foundations of subsidized health care for the elderly, are under great pressure to reduce costs even if that means a loss of benefits or higher costs for the elderly.[51] The continuation of these and other benefits for the elderly will depend greatly on the willingness of the nonelderly to assist the elderly.

Federal assistance to the elderly can be grouped into three categories: Social Security assistance; medical care assistance (Medicare and Medicaid); and all other assistance programs. In theory, as a minority of the population, the elderly are always at risk of losing federal benefits if the majority, the nonelderly, should lose their taste for subsidizing the minority. In reality, federal benefits for the elderly are reasonably secure, although the degree of political support varies among the three categories.

Social Security retirement benefits seem almost invulnerable to direct attack.[52] There seems little or no support for direct reduction of retirement benefits, and even the annual cost-of-living raise seems immune from elimination. Social Security benefits, however, have been reduced by an increase of the minimum retirement age to age sixty-seven.

PHYSICAL DISABILITY L. REP. 107 (1990); Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance,* 40 U. FLA. L. REV. 949 (1988); Frolik, *supra* note 49; Parry, *Legal Guardianship Under Attack: New Solutions for Balancing the Risks and Rights of the Elderly and Disabled,* 6 COMPLEAT LAWYER 10 (1989); *Guardianship: An Agenda for Reform,* 13 MENTAL & PHYSICAL DISABILITY L. REP. 277, 296 (1989).

51. SENATE SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1989, S. REP. NO. 249, 101st Cong., 2d Sess. 211-13 (1990). [hereinafter SENATE SPECIAL COMM. ON AGING]; *Alternative Approaches to Health Care Cost Containment,* 30 JURIMETRICS J. 447 (1990); Kinney, *Setting Limits: A Realistic Assignment for the Medicare Program?,* ST. LOUIS U.L.J. 631 (1989); Holahan & Palmner, *Medicare's Fiscal Problems: An Imperative for Reform,* 13 J. HEALTH POLITICS, POL. & L. 53 (1988).

52. Other Social Security programs, such as benefits for the disabled and dependents, have been reduced modestly. J. JORGENSEN, THE GRAYING OF AMERICA 192 (1980); *see* Harrington, *Social Security and Medicare: Policy Shifts in the 1980s,* in FISCAL AUSTERITY AND AGING 86-87 (C. Estes & R. Newcomer ed. 1983).

This change is due to begin in the year 2003.[53] Conversely, the earnings test was liberalized to allow retirees to earn more income without a reduction in the amount of the retirement benefits.[54]

Congress has been under much budgetary pressure to limit Medicare and Medicaid expenditures. It has sought to do so by increasing the cost to the enrolled elderly patient, and by reducing the cost of the provided services.[55] Other federal programs that assist the elderly (*e.g.*, Title III grants for community service under the Older American Act[56]), have been the focus in attempts at budget reduction though they too have come under pressure to limit expenditures.[57]

Although the elderly and their supporters may be fairly successful in protecting governmental benefits, they remain dependent upon these programs. Social Security represents over 28.3% of the income of those age sixty-five or older, and 43.5% of those age seventy or older.[58] In the absence of Medicare and Medicaid, where would the elderly come up with the billions of dollars for medical care that these programs provide? Other federal and state assistance programs represent a crucial margin of comfort and even necessity for the elderly.[59] Though some elderly are unnecessarily subsidized, the majority are very much in need and therefore very dependent upon the continuing goodwill of the young.[60]

(5) Family and Social Networks

Most of the of the elderly in need of assistance do receive it. As a result, the elderly live better than many suspect. A common mis-

53. R. MYERS, SOCIAL SECURITY 50 (3d ed. 1985). The increase in the age will be phased in gradually as the allowable retirement age is raised two months each year until, by 2022, it finally reaches age 67.

54. The earnings test requires a reduction in Social Security benefits for those under age 70 who earned more than the earnings limitation. Workers age 70 or older are not subject to the test. "In 1989, Social Security beneficiaries aged 65 to 69 had their benefits reduced by $1 for every $2 earned above $8,880." "For those between age 62 and 65, the earnings limitations was set in 1989 at $6,480 rising to $6,840 in 1990. Beginning in 1990, beneficiaries aged 65 to 69 will have benefits reduced $1 for each $3 earned above $9,360." SENATE SPECIAL COMM. ON AGING, *supra* note 51, at 23-24.

55. The latest example is the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, which both increased fees to Medicare enrollees and mandated cuts in costs.

56. 42 U.S.C. § 3021 (1973).

57. SENATE SPECIAL COMM. ON AGING, *supra* note 51, at 341-42.

58. SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 6 (1988).

59. Federal assistance to the elderly ranges, for example, from home heating subsidies, to meals on wheels, to legal assistance, to community senior citizen centers. For a discussion of these various programs, see SENATE SPECIAL COMM. ON AGING, *supra* note 51, at 275-399.

60. Just who is "unnecessarily subsidized" is in the eye of the beholder. Suffice it to say that because most federal assistance programs for the elderly do not have a means test, *e.g.*, Medicare, some who benefit from the programs are probably unworthy beneficiaries of federal largess.

characterization of the elderly is that they are trapped in a cycle of poverty and despair, isolated from the community, abandoned by friends and family, and incapable of self-sufficiency. This characterization is false. Many of the elderly are married,[61] most do not live in poverty,[62] and most are not in poor health.[63] For example, although approximately 1.5 million elderly individuals live in nursing homes, at any one time only five percent of the elderly are institutionalized.[64] The rate of residency in nursing homes by the elderly has not changed much in the past decade. Moreover, of those elderly individuals who live independently, less than a third live alone; elderly women, however, comprise the majority of the group that does live alone.[65]

The great majority of the elderly who live in the community are linked into social support networks that enable them to cope psychologically, emotionally, and physically with the vagaries of life. Such support can range from help with household chores to intervention on account of a health crisis.[66] The support may come from a church program or from a county assistance program. The elderly may obtain help from a community volunteer program or they may rely upon a federally funded senior citizen's center. They may have an arrangement with a neighbor who checks on them daily or they may regularly attend a publicly sponsored subsidized meal program.

Both formal and informal networks provide support for the elderly. The need for a formal network is great when an elderly individual is functionally impaired, has numerous health problems, and is without informal network resources. Formal resources are provided by insti-

61. AMERICA'S ELDERLY, *supra* note 27, at 25.

62. *Id.* at 88.

63. *Id.* at 111.

64. Hing, *Nursing Home Utilization by Current Residents: United States, 1985,* National Center for Health Statistics, DHHS Publication, No. (PHS) 89-1763, Series 13, No. 102 (1989).

65. AGING AND THE LAW, *supra* note 4, at xii-xiii. The living arrangements of noninstitutionalized elders varies. One statistical survey grouped these arrangements under three categories: living in households; living alone; and other, which included living in group homes, with relatives, and with nonrelatives. An overwhelming percentage of the elderly were found to be living in a household: 81.9% of men and 58.9% of women ages 65-74, and 68.2% of men and 31.2% of women over 75. Conversely, the study found far fewer elderly men and women live alone: 12.3% of men and 33.5% of women between the ages of 65 and 74 reside alone. Notably, only 2.8% of men over the age of 75 live alone as compared with a far greater percentage of women over 75—51.1%. Finally, the study determined that the smallest percentage of elderly falls into the "other" category. Only 7.8% of men and 8.1% of women reside in group homes, with relatives, with nonrelatives, etc. These percentages are greater, however, for elderly individuals over 75 with 10% of men living in "other" living arrangements and 17.7% of women. Notably, 13.9% of women age 75 or older live with a relative. Hess, *Gender and Aging: The Demographic Parameters,* GENERATIONS, Summer 1990, at 12, 14.

66. Antonucci, *Personal Characteristics, Social Support, and Social Behavior,* in HANDBOOK OF AGING AND THE SOCIAL SCIENCES, *supra* note 2, at 94, 96.

tutions, agencies, and their representatives. For example, the state or county area Agency on Aging provides formal support systems for many elderly.[67]

Informal networks typically are comprised of spouses, relatives, and friends. For many elderly, informal networks provide the primary means of support.[68] As individuals age, they generally rely on their marital partner for both instrumental and psychological support. Most elderly men are married. Many elderly women are widowed.[69] Approximately, seventy percent of women over age seventy-five are widows.[70] Since wives on average are four years younger than husbands, and because women outlive men an average of seven years, married women can expect an average widowhood of eleven years.[71]

If the spouse becomes frail, disabled, or dies, many elderly must rely on other family members for assistance. The first choice is usually an adult child, although the tendency to rely upon a child depends upon the child's proximity, the family's cultural background, and the socioeconomic status of the elderly individual.

Most commonly the elderly turn to a female for help.[72] Neither the increased participation of women in the work force nor the demographic trend of the shrinking family has decreased the traditional female dominance of the caregiver role. For example, seventy percent of all the adult children identified by their parents as primary caregivers were women.[73] The explanation of why women are so often the primary caregiver is a combination of complex cultural and economic factors. For one, caregiving falls within the purview of the domestic realm, which traditionally has been thought of as work more appropriate for women. In part, since women in the wage force on the average earn less than men, caregiving represents less of an opportunity cost to women than it does to men.[74]

In the absence of spouses or relatives, the elderly rely on friends, neighbors, and social organizations. The longer the elderly individual

67. R. ATCHLEY, *supra* note 36, at 151. For a discussion of social support systems in other cultures, see generally AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY 176-250 (J. Eekelaar & D. Pearl ed. 1989).

68. Antonucci, *supra* note 66, at 94.

69. AMERICA'S ELDERLY, *supra* note 27, at 30.

70. Rydden, *Sex in Later Years,* in THE ELDERLY AS MODERN PIONEERS 168 (P. Silverman ed. 1987).

71. AMERICA'S ELDERLY, *supra* note 27, at 30.

72. Montgomery & Datwyler, *Women & Men in the Caregiving Role,* GENERATIONS, Summer 1990, at 34, 35.

73. Stoller, *Males as Helpers: The Role of Sons, Relatives & Friends,* 30 THE GERONTOLOGIST 228-29 (1990).

74. Women typically earn only 60 cents for every dollar earned by men. Fischel & Lazear, *Comparable Worth and Discrimination in Labor Markets,* 53 U. CHI. L. REV. 891, 892-93 (1986).

has lived in the neighborhood, the more reliance the individual will place on friends and neighbors.[75] Also relevant to the use of informal non-familial support systems is the individual's attitude toward self-reliance. That attitude, in turn, is often culturally based. Elderly Asian Americans, for example, are more likely to seek help from friends rather than from governmental support systems. Hispanic elders who have no relatives to assist them are less likely than any other ethnic group to seek outside help in times of need.[76]

Many elderly seek support and assistance from social or religious organizations. Participation in and dependence upon organizations, clubs, or religious groups is strongly related to the sex of the elder (women use such organizations more than men), the social class (reliance declines as wealth increases), and the degree to which the individual was involved with the organization during midlife and later life. The majority of the elderly do not belong to such groups and of those who do, participation and involvement decreases as they age.[77]

Elderly reliance upon a child has been undercut by recent demographic and social trends. For example, the shrinking size of the family coupled with an increasing rate of life expectancy results in some parents outliving their children. Geographical mobility often means that children live too far from their parents to be of much assistance. Isolation from family causes additional burdens for society as family members are not available to offer the day-to-day support that some elderly may require. The result can mean a demand for home health care or homemaker assistance. Here, as with many cultural changes, law and public policy scurry to catch up with reality.

B. Conflicting Values

(1) Autonomy Versus Protection

The legal problems of the elderly are enmeshed in the cross currents of conflicting values. In fact, we cannot even define the problems of the elderly unless we can agree upon some fundamental values. Some needs are easy to identify. An elderly person who is hungry needs food. A lonely elderly individual should be offered opportunities for companionship. A disoriented elderly person requires assistance with his

75. R. ATTCHLEY, *supra* note 36, at 150.

76. Weeks & Cuellar, *The Role of Family Members in the Helping Networks of Older People,* 21 THE GERONTOLOGIST 388 (1981).

77. R. ATCHLEY, *supra* note 36, at 155.

affairs. Yet, while we can agree upon what these basic needs are, there is no such unanimity as to the appropriate means of fulfilling these needs. To feed the hungry elderly, for example, some might advocate cash assistance, others food stamps, and yet others the provision of meals. The preference for one solution over another is based in part on what other values the individual advocate feels are worth promoting when solving the immediate problem of hunger. In particular, the preferred solution often depends upon the relative importance accorded the values of personal autonomy and protection of the individual.

Personal autonomy refers to the right of an individual to act independently to ends and purposes that only satisfy the needs of the actor. Autonomy elevates the rights of the individual over the wishes or opinions of others as the autonomous individual acts only in response to his values and imperatives. Autonomy is not synonymous with selfishness or disinterest in others. An autonomous individual may well act in an altruistic manner if that is the way in which the individual believes that he should act. An autonomous individual may be responsible for others and may feel less "free" to act in a self-interested manner as a result of this responsibility. Yet, even under this circumstance the individual has made the *choice* to accept that responsibility. What autonomous individuals do not do is to allow others to make decisions for them.

Autonomous individuals are characterized by the lack of dependency and, therefore, as dependency increases, autonomy declines. All of us are dependent to some extent upon other individuals or institutions. For the autonomous individual, however, that commonplace dependency is only minimally intrusive. The more that individuals are dependent upon others or institutions not under their control, the less they are able to direct their own lives. If, for example, an individual's right to food depends upon the independent or arbitrary decision of another, that individual has lost a great deal of autonomy. Dependency, however, can be counteracted by the granting of rights. Food stamp recipients, to be sure, are dependent upon the largess of the government for their food, but they are able to act autonomously because the food stamps are theirs as a right that cannot be taken away so long as the qualifying requirements are met.[78]

Autonomy and personal rights form a concatenation that diminishes dependency. To reduce elderly dependency, we must recognize and expand the rights of the elderly. Autonomy means freedom in some sense, and freedom depends upon the individual having rights rather

78. *Cf.* Banks v. Block 700 F.2d 292 (6th Cir. 1983).

than being subject to the whims of others. The granting of rights, however, has its costs. Creation of rights also means the creation of correlative duties: an elder's right to food stamps is the government's duty to provide them. The creation of a duty diminishes the autonomy of the party burdened by that duty. If the administrator of the food stamp program must supply an elder with food stamps whether he thinks it wise to do so, the autonomy of the administrator to act has been severely circumscribed. If we define autonomy to mean not only the ability to control our own behavior but also the ability to control the behavior of those with whom we interact, then to some degree autonomy is a zero-sum game. As elder's autonomy expands, the autonomy of the other actor contracts. The more that an elder controls his own destiny, the less others can. Elder freedom expands only at the expense of contracting the power of others. Personal autonomy, therefore, translates into personal power. When we advocate autonomy for the elderly, we are talking of increasing the personal power of the elderly at the expense of the power of institutions and individuals who otherwise would control or direct the lives of those elderly individuals.

Autonomy, freedom, and personal power for the elderly are concepts that almost everyone would endorse. They are ritually invoked and applauded, but their true import is all too easily overlooked. Too many who would champion the value of autonomy for the elderly are either unaware of or choose to ignore the consequence of autonomy, namely a corresponding increase in risk to the elderly. Politicians, in particular, endorse freedom and autonomy for the elderly without recognition that freedom and autonomy is antithetical to another treasured value: protection of the individual.

As an initial reaction, many individuals quickly would endorse the general idea that the elderly should be protected against the unkind vicissitudes of life. They should be protected from economic want, from poor health, from abuse and neglect, from social isolation, and from anything else that might detract from their lives. Of course, no one would write a blank check to protect the elderly from all of life's trials and pains, but almost everyone would endorse the goal of protecting the elderly from the worst of life's hazards and providing them protection commensurate with fiscal reality.

Yet in the haste to endorse the deserata of protection for the elderly, many fail to appreciate that protection of elders is often antithetical to elder autonomy. To protect someone necessarily means to limit his freedom to act. If, for example, you want to protect me from being mugged, you might bar me from walking through certain streets late at night. If you do not want me to contract lung cancer, you will

not let me smoke. If you do not want an elderly person to be the victim of designing persons, you may appoint a guardian to take charge of his financial affairs.

What is missing in these "solutions" is an appreciation of the cost to the individual's autonomy. The value of protecting an individual must be balanced against that individual's right to and need for autonomy and independence. Because of the perceived vulnerability of the elderly, it is too easy to see and focus only on the perceived need for protection and to overlook the equally compelling right to autonomy. Lawyers, who by training should be sensitive to the balancing of competing values, have a major role to play in the sorting out of the proper mix of protection and autonomy.

The tension between the competing goals of autonomy and protection often arises in questions of the elderly and the law. For example, should the elderly be assisted economically by greater grants of income such as Social Security, or should they be provided special services or particularized programs such as meals on wheels? Should we attack elderly housing problems by granting elderly individuals a cash housing allowance, or should we build special housing for them? Promoting autonomy requires that we allow the elderly to live as they will even if they expose themselves to risks that they choose to take but that society considers unwise. Yet, ultimately when we emphasize protection, we may override the express or apparent wishes of the elderly in order to remove them from risk.

No magic test will determine whether to favor autonomy or protection. Each time the two values come into conflict, their competing worth must be measured. While some observers will reflexively favor one goal or the other, most will vacillate between the two and never satisfactorily resolve the conflict.[79] At times autonomy will be favored; in other situations protection will prevail. While there is no "solution," it is critical that the conflict in values be acknowledged and given due consideration in devising public policy and programs for the elderly.

79. The leading law review article espousing the value of autonomy is Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L. J. 1111 (1981). Other articles that discuss the issue in various contexts include: Ahmad, *Health and Welfare: Elder and Dependent Adult Abuse*, 19 PAC. L. J. 632 (1988); Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L. Q. 69 (1982); Katz, *Elder Abuse*, 18 J. FAM. L. 695 (1980); Matthews, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPPERDINE L. REV. 653 (1988); Parry, *Life Services Planning for Vulnerable Persons*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 516 (1986); Webb & Marshall, *Response to Criminal Victimization by Older Americans*, 16 CRIM. JUST. & BEHAV. 239 (1989).

(2) Generational Justice

In the past, economic security for the elderly was not a debatable goal. Practically speaking, everyone was for it. The debate centered less on the goal, but on the means. Because a retiree's economic security rests on a proverbial three-legged stool—private savings, employer provided pensions, and Social Security—the debate focused on how much of the retiree's income should come from each of the three sources. Typical questions included: Should the retiree be expected to save more? Should employee pension rights be expanded? Should Social Security benefits be increased? Underlying these policy debates were questions of individual responsibility, employer obligations, and economic justice.

More recently, however, a new theme of "generational justice" has emerged and the question now is how much the young owe the old. While the elderly do rely to some degree on their own savings or employer provided pensions, they also are very reliant on governmental assistance. Whether in the form of greater federal benefits—such as increased Social Security payments or greater medical care coverage—or more assistance from state and local governments—such as property tax relief or subsidized housing—the elderly have reaped a steadily increasing proportion of governmental benefit programs.[80]

During the economic boom years of the 1960s and 1970s much of the increasing aid to the elderly was paid for out of a growing flow of public revenues. As the economy prospered, federal tax revenues soared. As the Vietnam War wound down, the cost savings were largely absorbed by increased social programs, many of which disproportionately aided the elderly. Medicare was a particularly favored program.[81] State and local governments received new funding in the form of federal revenue sharing that allowed them to commence or expand programs for the elderly. Federal money also flowed into special grant programs for the elderly as the nationwide network of Area Agencies on Aging was established.[82]

So long as the size of the economic pie increased, few complained that the elderly were profiting too much. But in the 1980s with the Reagan years, the public's acquiescent tone began to change. Federal re-

80. For example, federal benefits for the aged increased from $44 billion in 1971 to $269 billion in 1986. AMERICA'S ELDERLY, *supra* note 27, at 151.

81. Lee & Benjamin, *Intergovernmental Relations,* in FISCAL AUSTERITY AND AGING, *supra* note 52, at 67-70.

82. The Area Agencies on Aging were established by the Older Americans Act, Pub. L. No. 89-73, 79 Stat. 218 (1965) (codified at 42 U.S.C. § 3001-3045).

venues no longer kept pace with expenditures. Federal revenue sharing ceased. Federal funding for state and local elderly programs failed to keep pace with demand. Other federal social programs also suffered cutbacks. It became obvious to all that the demand for federal assistance far outdistanced the available supply and that the budget had become a zero-sum game. Every dollar given to group X was one less dollar for group Y. If programs for the elderly expanded, they necessarily did so at the cost of other social programs.

Articles began to appear that questioned whether the elderly were truly the most needy, the most deserving.[83] In particular, critics of aid to the elderly began to assert that the younger population was not being *asked* to sacrifice unnecessarily for the elderly. The young, it was said, were *forced* to pay excessive taxes in order to benefit relatively well-off elderly. The elderly, portrayed as well-off retirees, enjoyed a subsidized lifestyle at the expense of younger workers. Meanwhile, segments of society with real needs, such as children in poverty, were given far too little help.[84]

The assertion that the elderly as a group are oversubsidized is certainly subject to doubt.[85] But more fundamental questions cannot be ignored. Are the elderly receiving too much assistance relative to other needy segments of society? Are the elderly being excessively subsidized by the young? Of course, these questions have no objective "right" answer. They reverberate with fundamental and unanswerable questions: what do the young owe to the old, what is a good society, and ultimately even what is justice?

Much of the impetus for the generational justice argument comes from the sense that the elderly are reasonably well off and do not deserve the amount of assistance that they receive. Certainly the elderly poverty rate is below the national average.[86] Moreover, much of the aid to the elderly is not reported as income because it is in-kind or is in the form of reduced prices. Benefits to the elderly include free public transportation, property tax rebates, reduced prices for prescription drugs, subsidized medical care, lower fees for public recreation, and

83. The leading exponent of the "elderly ripoff" theory is Phillip Longman. *See* P. LONGMAN, BORN TO PAY: THE NEW POLITICS OF AGING IN AMERICA (1987); *see also* N. DANIELS, AM I MY PARENTS' KEEPER? (1988); Chakravarty, *Consuming Our Children,* FORBES, Nov. 14, 1988, at 222-28.

84. *See supra* note 52.

85. Without the current subsidies, particularly Social Security benefits and Supplemental Security Income, millions of elderly who at present have incomes just above the official poverty line would fall below it. R. MARGOLIS, *supra* note 43, at 31.

86. H. AARON, B. BOSWORTH & G. BURTLESS, CAN AMERICA AFFORD TO GROW OLD? 31 (1989).

publicly financed senior citizen support centers. The cumulative effect of all these benefits is to further remove the great majority of elderly from poverty to an extent not measured by an examination of income alone.[87]

Because of their political power, it is argued, the elderly are oversubsidized and younger taxpayers are victimized. While the elderly enjoy comfortable retirements, the young struggle to maintain a standard of living equal to that of their parents. Burdened by high wage taxes that flow to non-needy elderly, the argument continues, younger workers struggle to meet the costs of supporting their families. In particular, younger workers find it increasingly difficult to pay for college education for their children. Nor are they able to save for their own retirement. Instead of preparing for their own retirement, they pay for the retirement of the current elderly. In short, the young are being victimized by the old. Current policies create generational injustice.[88]

The generational justice argument is concerned not only with justice for younger workers, but also with adequate aid to other, younger potential recipients of public assistance. Here, the claim is that the elderly are unduly favored. In the past, when the elderly asked for aid, individuals questioned whether they needed assistance, whether it was right to help them, and whether we could afford to aid them. The eventual answer to those questions was translated into policy in the form of cost of living increases for Social Security recipients, Medicare and Medicaid support, funding for social support programs, and subsidized housing. The debate was between the elderly and the taxpayer. But as the costs for these and other programs for the elderly outstrip inflation, the debate has been transformed into one between the elderly and others who claim that they too need help. It is said that the elderly must pull back from the public fiscal trough to let others have an opportunity to meet their own needs.[89] The elderly are devouring so much of the social welfare pie that others are left with inadequate shares. Social justice demands that the elderly lose their preferential spot so that others, who perhaps are younger but are more needy, can be served.

Another possible twist to the generational argument is the claim that there is an intragenerational dispute that pits the poor elderly against the more well-to-do elderly.[90] The two largest aid programs for the elderly, Social Security and Medicare, are available without regard to need.

87. *Id.*

88. See J. JORGENSEN, *supra* note 52, at 164-85.

89. P. LONGMAN, *supra* note 83.

90. S. CRYSTAL, AMERICA'S OLD AGE CRISIS 30 (1982); Estes, *Perspectives of a Political Economist* 265, in FISCAL AUSTERITY AND AGING (C. Estes & R. Newcomer ed. 1983).

The rich stand in line with the poor. What is the fairness, it could be argued, of assisting elderly who are not needy while allowing other elderly individuals to remain below, or only modestly above, the poverty line? Federal and state elderly assistance programs, the argument would have it, should be reconfigured to direct more dollars to the poor and fewer dollars to the well-off elderly.

The recent saga of the Medicare Catastrophic Coverage Act,[91] however, is a discouraging example of what occurs when the government attempts to remedy this alleged uneven distribution. Faced with clear evidence that catastrophic illness was financially devastating to millions of the elderly, Congress passed legislation that would help pay for such costs. Because the federal budget already was running large deficits there was no money to pay for the program. In order to finance the program, Congress levied a tax on the more well-off Social Security recipients.[92] The program redistributed benefits from the richer elderly to the poorer. As the elderly began to comprehend what had happened, a firestorm of protest broke out. Using their very real political power, those elderly due to be taxed under the program successfully lobbied for its repeal.[93] Even though all the elderly would have benefitted under the program and only a minority would have paid for it, Congress bowed to the objections of that minority. It was a textbook case of a class conflict won by the upper class.

(3) Age Discrimination Versus Justice

Discrimination. The word conjures up images of prejudice, hate, misunderstanding, and ill-feeling. Discrimination of all kinds, whether racial, sexual, or age-based, is publicly scorned and outlawed. We all "know" that to "discriminate" is bad. Yet in the dictionary the first definition of the word "discriminate" is the act of making or perceiving differences,[94] which is a quite neutral and possibly useful act. The pejorative implication of the word has obscured its fuller meaning to such an extent that now it is used rarely except to describe objectional behavior. Yet if age discrimination is bad, how are we to defend Social Security retirements benefits that are limited to those age sixty-two or older? The answer, of course, is that we find age a very useful criteria

91. Enacted as Pub. L. No. 100-360 (1988), repealed 16 months later by The Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234.

92. SENATE SPECIAL COMM. ON AGING, *supra* note 51, at 169.

93. *Id.* at 181-83.

94. *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE 745 col. 3 (2d unabr. ed. 1961): "To make a distinction; to distinguish accurately; as, to *discriminate* between fact and fancy; also, to use discernment."

when distributing governmental benefits. In a larger sense, we approve of discrimination that favors the elderly, but condemn it if it disadvantages them as is the case with age discrimination in employment.

While it seems unnecessary to debate why society should disfavor negative discrimination against the elderly, it is less apparent why it should condone discrimination against the younger when it favors the elderly. For example, why should Medicare be available only for those age sixty-five or older? The justification cannot be need since the program has no needs test. Similarly, why shouldn't individuals who retire before age sixty-two be allowed an actuarially adjusted Social Security pension? Again, need is not the issue since those age sixty-two or over can receive retirement benefits without a showing of need. The probable answer to these and similar questions regarding other special programs for the elderly is that cost considerations make it impossible for the programs to be universally offered. The elderly are selected as the favored group because old age, at least historically if not currently, is associated with need.

The use of old age as a surrogate for identifying those who should be favored, however, goes beyond a crude identification of age with need. The elderly are favored because of our collective perception that they are a sympathetic group who deserve our assistance. Because we do not want to be old, because we fear old age, we try to ameliorate it, to make it better somehow. Because we think that old age is a lonely, depressing time of life fraught with illness and the fear of death, we feel guilty in our own youth. We think we should do something for the elderly, but being unable or unwilling to do it as individuals, we support publicly sponsored social programs that assuage our guilt. At the same time we also attack negative discrimination against the elderly by the passage and expansion of legislation such as the Age Discrimination in Employment Act.[95]

The challenge for the law is to reconcile the tension in policies that both attack and promote age discrimination. To do so requires our understanding that it is not paradoxical to outlaw age discrimination while simultaneously using age as a basis for governmental assistance. Age discrimination is wrong because it allows individuals to be judged by a largely irrelevant criterion and one over which they have no control. Conversely, age as a basis for governmental assistance is sensible because it is the least demeaning, most efficient method of identifying aid recipients. Yet to merely state the argument for age discrimination that favors the elderly is not to prove it. Moreover, if we fail to understand

95. 29 U.S.C. § 621 (1989).

the rationale for favorable age discrimination, it remains in peril, always susceptible of being dismissed as no more justifiable than age discrimination *against* the elderly.

C. Justifications for Age-Based Discrimination that Favors the Elderly

(1) Financial Justifications

Traditionally the economic needs of the elderly have justified their special treatment. Although Americans never have been particularly charitable to the poor as a whole, they are sympathetic to the elderly poor. People believe elderly poor are "deserving" in part because people believe that it is not the elderly's fault that they are poor. They are not poor because they are lazy or will not work, but because they are victimized by their age. Moreover, today's young people realize that some day they too will be old, and therefore, by helping the elderly today, they somehow protect their own futures.[96] The combination of the belief that it is right and proper to help the elderly and the desire to protect one's own old age is a strong impetus for public assistance for the elderly.

The countervailing attitude, however, is that the elderly ought to save for their old age. After all, old age is not an unexpected event. If the elderly want to be financially secure, one can argue that they should plan ahead, save more when they are young, and defer retirement. The economic problems of old age are largely the result of a personal failure to plan. If the individual had been more concerned about his needs in his old age, had he been more of the proverbial ant and less the grasshopper, he would have been financially secure in his old age. In short, the argument goes, elderly poverty is less the result of social problems and more the result of individual irresponsibility.

The belief or suspicion that the poor elderly do not deserve society's help (or only deserve modest assistance) may become reinforced with the abolition of mandatory retirement. If a worker cannot be retired merely because of age, skeptics may begin to ask why we should support someone who is capable of working but instead chooses to retire. The retired elderly may be viewed less sympathetically and as having more in common with younger recipients of welfare.

The disbursement of Social Security benefits always has enjoyed wide support because the public thinks of it as something earned in the

96. Many also protect their present interests. By having the government aid the elderly, many of the young are relieved of the burden of financially assisting their parents or other older relatives. In that sense, the young are very real beneficiaries of Social Security.

form of insurance rather than some welfare payment given to retirees.[97] Increasingly, however, members of the public are becoming aware that their current taxes pay for the retirees. This is particularly true with regard to the perception of Medicare, the benefits of which never have been paid for by pre-retirement contributions of the current retirees but rather are financed by current tax revenues.[98] As the public becomes more aware that its taxes support the retirees, it is likely that more questions will be asked as to why working class taxpayers should sacrifice to support middle or upper class retirees.[99] Perhaps not stated, but likely felt, will be a sense that even the poor elderly are at least in part responsible for their situation. Ultimately, regardless of the financial situation of the elderly, the tax-paying public is likely to become increasingly less sympathetic toward the elderly, and may be able to rationalize contributing less for their assistance.

The challenge to the law will be to reconcile these conflicting images of the elderly. Are they a group who deserve special support or are they more like those active, affluent individuals that they are so frequently portrayed as in advertisements? The two views likely never will be reconciled completely, but rather will continue to be the ying and yang of the debate about the proper public policy towards the elderly.

(2) Health Justifications

The elderly are not as healthy as the rest of the population. Due to their advanced years they are more susceptible to chronic conditions, are more likely to be hospitalized, and have longer hospital stays.[100] As a result, the elderly are disproportionate consumers of health care.

The poorer health of the elderly makes them the objects of the younger population's sympathy. Although some of the health problems of the elderly can be blamed on their past behavior such as smoking, the great majority occur through no fault of the victim. The young sympathize with the elderly, if for no other reason than that they know that they too will be old some day and that they may suffer from the same health problems. The elderly also earn the public sympathy because they are approaching the end of their lives. Due perhaps to some atavistic impulse, most of us feel that those close to death have a greater

97. R. BALL, SOCIAL SECURITY TODAY AND TOMORROW 8-9 (1978); M. BERNSTEIN & J. BERNSTEIN, SOCIAL SECURITY: THE SYSTEM THAT WORKS 13-14 (1988).

98. Any confusion in the public mind will probably be dispelled by the recently authorized increase in Medicare wage taxes due to take effect in 1991.

99. Of course, the elderly also pay taxes but, as a group, they are perceived to pay less in taxes than they receive in benefits.

100. *See* R. ATCHLEY, *supra* note 36, at 78-79.

call upon our sympathy. We feel more beholden to them, and are more likely to respond to their calls for help.

The relatively benign attitude of the young towards the elderly and their health problems has resulted in significant governmental health care assistance for the elderly,[101] most notably in the form of Medicare and Medicaid. These, in turn, have spawned a small legal cottage industry as the elderly battle with governmental bureaucracies as to their eligibility rights and levels of benefits.[102] Beyond the disputes of individuals, however, governmental health care programs for the elderly raise deeply troubling issues of how much health care assistance we really owe to the elderly and how much we can afford.

If all health care were privately purchased, we might be concerned that the affluent elderly were purchasing so much health care that they were unduly driving up the price and crowding out other potential users. But because elderly health care is subsidized, we must ask the difficult questions of just how much health care we can afford and how to allocate it. At one level these are classic questions of public policy and could be asked about almost any governmental aid program. But beyond these policy issues are much more fundamental questions about our national values: who is deserving of aid, how we choose between competing needs, and whether advancing age reduces an individual's right to medical aid. Other questions include who should make the allocation decisions, whether some lives are more valuable than others, who has priority: the old or the young, and whether the maintenance of life always is the highest priority.

These are difficult questions for an individual to answer.[103] For a society to collectively come to some understanding or agreement on these conundrums is essentially impossible. Yet, as with other puzzling questions of public policy, although the answers are never articulated, policies and programs will continue to evolve and be formulated. Only then can the values implicit in the programs be discerned and the contradictions be revealed. With the operating values exposed, the process of debating their relative merits can commence and modifications of the policy and programs can follow. At present, however, the debate is only in its infancy. For the most part the issues are reduced to "I need" and "I can't afford." Although the country has enacted massive

101. Of course, the elderly have lobbied very effectively on their own behalf for health care subsidies.

102. At the Second Annual Elder Law Symposium sponsored by the National Academy of Elder Law Attorneys in May 1990, one third of the presentations (8 out of 25) dealt with the legal issues of Medicaid and Medicare.

103. The most thoughtful examination of the issue is D. CALLAHAN, SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY (1987).

medical aid programs for the elderly, it has never asked or debated the values upon which those programs must necessarily rest. As a result, complaints about the cost of Medicare are trivialized into issues such as whether physicians or hospitals earn too much, rather than focused on what is an appropriate share of our national wealth to devote to medical care for the elderly. Instead of asking what is the "right" amount of medical care to provide to the elderly, we quibble about the size of the Medicare deductible.

The challenge to the law and to lawyers in the future will be to move the arguments beyond mundane program details and immediate financial concerns to a meaningful examination of policy choices. In particular, lawyers must insist that medical treatment allocations for the elderly raise fundamental philosophical choices about the relative rights and obligations of generations. We cannot answer the question of how much to give to the elderly until we can answer why we should give them anything. Only when we appreciate why our concept of a just society demands allocation of health care to the elderly who cannot afford it will we be able to conceive a consistent policy and create programs that translate those deeper values into practical reality.

D. The Right of the Elderly to Benefits

The elderly are worthy of lawyers' special concern if for no other reason than that they are favored by so many public and private benefit programs. From Social Security to employer provided pensions, from Medicare to discounts at movie theaters, the elderly are the most favored age group in our society. Whether they should be is a compelling question, but not one here addressed. Instead our interest is in how the existence of these programs has created a rapidly expanding need for legal assistance.[104] It is true, almost to the point of being a cliche, that benefit programs, whether public or private, are bonanzas for lawyers. Benefit programs create entitlements that in turn create rights, and when those rights are not forthcoming or are in dispute, the need for a lawyer is apparent.

In the past, the legal problems that arose from programs such as Social Security or employer provided pension rights were thought to be subsets of traditional legal areas, principally administrative law. Alternatively, the problems were considered as part of a doctrinal area such as pension law. Law schools and lawyers did not perceive that the

104. The need, however, is not always met. Poorer elderly individuals have great legal needs that currently are unmet. Even middle class elderly may believe that the cost of adequate legal representation is beyond their means.

legal problems of the elderly could be approached as having a common focus. Instead the law school curriculum arranged (and to a large extent still does arrange) the areas of concern by doctrine: estate planning, health law, pension rights, administrative law, or perhaps a housing seminar. Gradually it has become apparent, however, that the legal problems of the elderly are a significant aspect of all these courses and that these elder-particular legal questions transcend the doctrinal limitations of the courses. For example, in a course in health law one would naturally examine Medicare and Medicaid. The fairness issues these programs raise, however, are the same as or overlap with issues that arise in a study of pension rights. Moreover, how can one fully comprehend pension rights absent an understanding of the Age Discrimination in Employment Act? The study of one set of entitlements in isolation is incomplete. It is as if it would be sensible to study one room of a house and never mention that it was part of a larger shelter. One might understand the room, but would never comprehend how it functioned as part of the house.

Practicing lawyers have begun to come to similar conclusions regarding their practical knowledge. In the past the area of specialization most closely associated with the elderly was estate planning. That practice, however, focused on the preservation and passage of private wealth. Lawyers increasingly have begun to appreciate that for many elderly the largest share of their "wealth" is their entitlements. The value of Medicare or of a private pension might dwarf the value of the client's assets. The ability of the client to draw upon public and private benefits might be his most valuable "asset" or might be the way to protect his other, more traditional, assets.

As a result of their expanded knowledge of other laws that affect the elderly, lawyers have begun to call themselves elder law attorneys. Just as academics have started to organize courses around the legal needs of the elderly, "elder law attorneys" have emerged to advertise their ability and willingness to serve an elderly clientele.[105] Generally, the elder law practice centers on estate planning, planning for Medicaid eligibility, nursing home placement and patient rights, planning for possible incompetency, health care decisionmaking and right-to-die issues, pension rights, and employment discrimination. While the number of full-time elder law specialists is small, the number of lawyers who devote

105. In 1987 the National Academy of Elder Lawyers was organized. By late 1990 the group had more than 900 paying members. Other evidence of the growing recognition of elder law is the existence of the American Bar Association's Commission on the Legal Problems of the Elderly, the National Senior Citizens Law Center, and the various ABA and state bar committees that focus on legal problems of the elderly.

at least part of their practice to elder law is probably fairly large, particularly when we consider the traditional estate planners as well as pension specialists.

The growth in elder law attorneys merely reflects the working of the fundamental adage that the creation of rights requires lawyers to uphold, define, and defend those rights. With the increase in the number of the elderly and an increase in programs designed to benefit them, the passage of the federal legislation guaranteeing the rights of nursing home patients being the most recent example,[106] a corresponding increase in the number of lawyers practicing in the field of elder law can be expected.

V. The Right to Self-Determination

How elder law lawyers conduct themselves will have a telling effect upon how the elderly will be treated in our society. Fundamental to the status of the elderly is the extent to which they are guaranteed and retain their autonomy and right to self-determination. Will the elderly be permitted to act in ways that they desire or will they be channeled into behavior deemed by others to be appropriate and safe? The bedrock of Western jurisprudence is comprised of the matched ideals of individual responsibility and individual autonomy. Individuals are presumed to be accountable for what they do or fail to do. In turn, individuals are allowed to choose the way in which to live even if that means the right to be irresponsible or self-destructive.

The elderly, however, are not necessarily accorded the same respect for their individual autonomy. Too often the elderly are treated as if they were aged children who need protection and guidance.[107] The young adopt a paternalistic attitude toward the old and do what is "good" for them with little regard for the desires of the elderly. The view that the elderly, far from possessing the wisdom of their years, regress into irresponsibility is not new. Shakespeare expressed it at some length in Jacque's seven ages of man speech:

> And one man in his time plays many parts, His act being seven ages . . . Last scene of all, That ends this strange eventful history, Is second childishness, and mere oblivion, Sans teeth, sans eyes, sans taste, sans every thing.[108]

106. Omnibus Budget Reconciliation Act, tit. IV., subtit. C., Pub L. No. 101-239 (1989), 101 Stat. 1330, 1330-160 to 1330-221 (1987).

107. *See supra* Part IV.B.1.

108. W. SHAKESPEARE, "As You Like It," II.vii, lines 142-43, 164-66 (The Riverside Shakespeare ed. 1974).

In less lofty sentiments we hear it expressed in sayings such as, "There is no fool like an old fool." Spunky, but immature and irresponsible, old folks long have been stock characters in movies and television.[109] More formally, the law recognized the possible decline of intellectual functioning in guardianship statutes, which in the past often referred (and still do refer in some states) to a loss of competency because of the "infirmities of old age."

The concept that the elderly might be less competent than their younger counterparts has some basis in truth. A minority of the elderly are afflicted by dementia, most of which is caused by Alzheimer's disease, and that affliction does cause some to regress mentally.[110] The elderly also suffer short term memory loss, can be disoriented in new surroundings, and may be less assertive than the young.[111] But there is no truth to the conceit that the elderly lack judgment or a sense of their own best interests. Even if some do suffer a loss of competency, that is not an infirmity that should be ascribed to all.

One of the primary tasks of elder law lawyers will be to attack the myth that the elderly are not responsible and are inevitably in need of guidance and supervision. The pernicious effects of the myth of elder incompetence are pervasive. In the past it was used to justify mandatory retirement and it probably still is used to justify the nonhiring of elderly workers. Even the current elderly assistance programs likely are infected with the bias towards acting in the "best interests" of the individual as determined by objective societal values at the expense of individual dignity and self-determination. Working out the conflicting themes of protection and autonomy will be fundamental to the future of elder law. Just as we have been told that the poor always will be with us, so too will the elderly. How we as a society treat them will reveal much about us as a people. Let us hope that what we learn is to our credit.

109. The actor, Walter Brennen, practically made a career out of portraying a loveable, but slightly daft old man. Recall his role of Granpappy Amos in the television series, "The Real McCoys."

110. *See supra* notes 41, 46-50 and accompanying text.

111. *See* R. ATCHLEY, *supra* note 36, at 91.